UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

BANCO SAN JUAN INTERNACIONAL, INC.,

Plaintiff,

v.

THE FEDERAL RESERVE BANK OF NEW YORK and THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Defendants.

----------x

New York, N.Y.

23 Civ. 6414(JGK)

Motion (Telephonic)

July 26, 2023
5:00 p.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

WINSTON & STRAWN, LLP
Attorneys for Plaintiff
BY: ABBE D. LOWELL
KELLY A. LIBRERA

MICHAEL BRENNAN
Attorney for Defendant The Federal Reserve Bank of New York

JOSHUA CHADWICK
Attorney for Defendant The Board of Governors of the Federal Reserve System

(The Court and counsel appearing telephonically)

LAW CLERK: This is Banco San Juan Internacional, Inc. v. The Federal Reserve Bank of New York, et al., 23 CV 6414.

THE COURT: Who is on the line for the plaintiff, please?

You have to unmute. Anyone on the line for the plaintiff?

MR. LOWELL: Sorry, sorry. This is Abbe Lowell of Winston & Strawn on behalf of BSJI. Also on the line is Kelly Librera also of Winston for BSJI.

THE COURT: Okay. Thank you. Who is on the line for the Federal Reserve Bank of New York?

MR. BRENNAN: Michael Brennan here for the Federal Reserve Bank of New York, your Honor.

THE COURT: And who is on the line for the Board of Governors of the Federal Reserve?

MR. CHADWICK: Good afternoon, your Honor. Joshua Chadwick for the Federal Reserve Board.

THE COURT: Thank you. Okay.

I've received the papers from the plaintiff asking for a temporary restraining order and essentially a schedule for the preliminary injunction. I received a letter from the Federal Reserve Bank of New York.

I have several observations based on the papers. Of course I'll give you a schedule for the preliminary injunction.

The question with respect to the temporary restraining order raises various questions. Among the questions is whether the parties wish to enter into some form of agreement that holds the status quo under any one of a number of circumstances. For example, the Federal Reserve Bank of New York has indicated that throughout the papers that it was prepared to give another extension for purposes of, I'll say BSJI, the plaintiff, establishing a correspondent relationship with another bank.

So, it is also possible that the Federal Reserve Bank would be prepared to enter into some other form of standstill until the preliminary injunction could be decided. There have been a lot of delays over the years where Federal Reserve Bank of New York indicated that it would not continue the BSJI's master account. The question is whether the Federal Reserve Bank of New York would be prepared to do that again, while the preliminary injunction was being decided.

Throughout its papers, BSJI says they would be prepared to, you know, enter into any conditions, I assume, reasonable conditions, that the Federal Reserve Bank of New York wanted to accomplish their desires for protection. There are obvious mechanisms, if in fact the offers by BSJI are accurate. There could be a federal monitor to assure that there are no improper transactions that occur while the preliminary injunction is being considered.

On the other hand, there are a couple of things that I

should bring to your attention. One is, in the letter from the Federal Reserve Bank of New York today, the Federal Reserve Bank actually set out a standard for the preliminary injunction which would also apply to the TRO, which is actually less exacting than the standard that would have to be applied, because this is an injunction, and a TRO that's being sought by the government and under -- in the public interest -- someone took themselves off mute. Thank you.

Under those circumstances, the alternative of serious questions going to the merits doesn't apply.

Also, with respect in particular to the TRO, and also with respect to the preliminary injunction, there is a concern that the Federal Reserve Bank of New York has been indicating that it intended to withdraw the master account status for months. It did it back in 2022, it did it on September 15, 2022, and it certainly did it on April 24, 2023. So, the Federal Reserve Bank of New York is right to say, papers, particularly papers seeking a temporary restraining order, could have been brought months ago, and certainly earlier than about four or five days before the Federal Reserve Bank of New York said it would revoke the master account status.

Another item that I just bring to your attention is in reviewing the moving papers, you get no sense, really, of the ultimate reasons that the Federal Reserve Bank of New York was relying on to revoke the master account status.

The concerns about abuse of the account, the failure to update the reports, the dangers of using the account for illicit purposes, and the failure to file any SARs, one gets no sense of that from reading the papers in support of the TRO and the preliminary injunction.

So, these are preliminary observations. Plainly I will give you a schedule for the preliminary injunction. Plainly I'll listen to the parties for anything they would like to tell me with respect to the TRO or otherwise. And in particular, I would certainly welcome the parties' thoughts as to whether there is a way that you all can work out something to moot the TRO. If not, of course, I have a request for a TRO before me and I'll decide.

So those are my preliminary observations on the papers.

Mr. Lowell.

MR. LOWELL: Yes, Judge. Thank you.

I've been taking notes. Let me see if I can address your points in the order that you made them.

You began as you ended with the concept of would we be able to do something that was more orderly. And the answer from BSJI is that, indeed, we can, and offered to do that. I think your observation, based on the letter or the argument of the defendants that why is this all happening in the crisis moment it is, really doesn't set out a couple of points which

the Court should also take into consideration.

This could not have been done months ago. It could have only been done at the earliest, if you think about it given the chronology of what we've set out in our papers, somewhere at the end of June. Because by June 20, we were still engaged in what we called the back and forth where we would answer a question, they would then come up with a different reason, we'd answer the question. And it was only on June 30 where that process finally ended and they said those backs and forths are done.

We then had the conversation with them as to, okay, you're leaving us no choice but to move forward. We offered, therefore, at that point the idea of doing it in a more orderly fashion, with a agreed-upon schedule for a preliminary injunction and not TRO. We had a lovely conversation about the possibility with one of the counsels on the call, and we did that on July 7. Then on July 10 -- I offered that on the 7th. On the 10th we got a call in which we made that proposal, and it took the Fed three days to come back and say we'll agree to a schedule, but we won't agree to stay the closure of your account while we go on for the next month or so. Of course that would have made the whole point of this moot.

If the Court has this impression, I'd like to turn that impression on the other side, and to turn it on the other side, I want to point out the obvious. Which is, as you

already pointed out, the idea that we couldn't today go back to what we offered them a few weeks ago, to set out a more orderly schedule, makes no sense. We are the bank operating today and as the next week as we play this out, the same bank with every day, more compliance programs than the day before, for months, when they allowed this bank to continue on. As you pointed out, this starts in June of 2022, at least in the newest iteration. In which in June of 2022, they say this is the reason we are going to close you down, you missed a deadline, a deadline our papers point out don't really exist. So we went back and forth on that. The bank is operating in that period of time. It is operating to September when we have the next back and forth. It is operating in January of 2023 when we write back and say what's going on. It operates in February, March and April when we have the April letter. It operates in April, May and June until they call it.

The idea that some emergency that wouldn't allow an orderly schedule for them to respond to our papers and us to then have that reply and then to put it before you, honestly, Judge, makes no sense. We have not delayed. We are not inventing the crisis. We have been in good faith even as recently as the end of June thinking we might get somewhere.

Remember our history. When we've answered questions for them and told them that our answers are complete, and if they still want to take action, they are going to leave us no

choice to go to court, they have rescinded us and given us the next operation to operate.

We didn't generate the crisis. As to why we wouldn't be able to impose the order you are suggesting, we should definitely do that. I don't know they wanted to concede, the other day when we talked, that their issues of concern against us are so minimal they could wink and say, okay, we'll let you operate for the next four or five weeks while we play this out. But I think it is exactly what should have happened and it still should happen. I think you're on to something. And I also think the history of what happened here should indicate that's what should happen.

As to whether or not there could be some additional protection to maintain the status quo, which was your next point, we kept in every conversation with them asking for specifics, so we could address the specifics rather than what you said in one of your points later, which you are not really sure what the grounds are at this point for them when they say generalities like deficiencies. Let's use that one for example.

In April of this year, when they decided to turn our very able outside experts, who have been opining on the compliance and the safety of our bank, and said these are things that we recommend for future compliance or future enhancement, let's put it that way, they then said, okay, that

shows you have all these deficiencies. When you get down to it, those deficiencies have already been addressed.

I guess what I am saying about your point on conditions. We have met them. I don't know the concept of -- you used the word monitor. If you understand how the bank operates now, given the few accounts, relatively few, I mean, this is important for us to maintain our bank and maintain our customers and the services we provide. We are monitoring in real time the transactions, which is what we have told them, and what the experts who have opined on our safety and soundness and our compliance with anti-money laundering, etc. have all told them.

This idea that somebody else could join in and have a desk next to the desks that are there, I think that's possible. I'm sure there are other things we could do in the interim that's -- but I think your point is, sure, if they would have engaged us at the end of June, if they engaged us when I spoke to them on July 10, if they engaged us with a specific as to what is the problem that makes us so unsafe and sound that we are going to be a risk to the entire banking system in this little bank with few people, we would have addressed it.

So if there is the ability to do that on this call, let's do it.

One of the things you said as another example is a correspondent bank. That is in effect sort of the illusory

possibility that they've said in their letter. Think about it. If we are suspended, and given the history between us and the Fed, there is not a correspondent bank that we've started to talk to that thinks this is something they want to do it. And the cost of doing it would be so prohibitive it would be the death knell in any event.

There are other things we can do in the interim which don't need to have your Honor in the middle of it. As to their stating in their letter something about the standard, you pointed it out, so I want to address it. Not exactly the way I understand the way the law would apply here. They may get some more leeway if they are expressing that they are in their regulatory hat, regulatory mode, operating as an agency in doing that in something they'll call public interest.

But those cases that would dilute either the standard for success on the merits, or, in our case, for a TRO, more likely the serious question issue which you raised, only applies if you look at the context are those threats to the public's interest that are not indicated by the same set of things I pointed out, which is the amount of time we have operated in our backs and forths with the Fed here and the defendants, without there being a concern enough they had to do it the day after tomorrow.

So those cases would not apply to then get us back to the normal three, four point standard of a TRO. And I don't

think anybody will seriously contest that we meet the first one. This is irreparable harm. If on Monday they shut us down, we are shut down. The master account is too critical to the operation of a financial institution to be able to operate without it.

So then we get to the issue of the success on the merits. And when the harm is as great as it would be, you know as well I do, you probably do TROs and preliminary injunctions every other week if not more than that. That's when the scale goes to you can get to the point of being at least 50 percent and if -- in the success on the merits, on the serious question, look -- look at the serious questions they pose back to us in the letter which was filed right before we came on with your Honor. There's a lot of issues, for example, if they think that there is a contract issue that supersedes the statute, when the law says a statute that give us a right or gives a person a right, it definitely trumps a contract that would try to take it away. Those are things we should address. I can't address it in detail because I only got it 30 minutes ago.

I think on the serious question, given the issues we've raised about the non-discretionary aspect of their authority, the issue of when they are wearing their regulatory hat, what you have already pointed out, which is if you are not sure on today's call what is the specific ground that they are

using to now justify the closure of the master account, you are not alone. And that itself would indicate that we have a more than credible way to present to your Honor the issue of they're acting in an arbitrary and capricious fashion.

On that, the last point I think you made was -- I think that was the last point you made frankly in my note.

So let me recap before we hand it over to them to say we are very willing to enter a schedule, we had one in mind, I think we offered it to the Fed on that July 10 call until they said but you have to close down for us to do this. And we would be very willing to recreate that with them. If you're saying or if they are saying what would it take, you used the word reasonable conditions, we are amenable to reasonable conditions. Of course "reasonable" has to be defined.

So, I think what we are saying is, we ought to be able to work this out. But if they say nope, we're not going to accommodate either the specificity that the judge said or what you're asking for, and therefore we can't come up with conditions that were reasonable, then we'll have no choice but to have this TRO hearing, whether it be today or tomorrow or whenever you want to do it.

THE COURT: Okay. Thank you.

Mr. Brennan?

MR. BRENNAN: Yes, your Honor. Happy to provide a response here. And there has been discussion about of a

preliminary injunction schedule. I guess I want to be clear from the New York Fed's perspective, is we don't think the standard for a TRO has been met, so there is no real need to get to that stage. And the foremost factor here is irreparable harm.

THE COURT: Whoa, whoa. I'm not sure I follow that. The plaintiff asks for a temporary restraining order and a preliminary injunction. The temporary restraining order is there for a maximum of 14 days, can be renewed for another 14 days. Plaintiff is entitled to a schedule and a hearing on the preliminary injunction.

So, the temporary restraining order is immediate and temporary relief until preliminary injunction can be decided, and has to be decided within at least 28 days. So, there are two separate issues.

And often times, the parties work out some modus vivendi with respect to the TRO. So, and irrespective of what happens on the TRO, you all have to brief and I have to decide the preliminary injunction. Because the TRO, one way or another, doesn't moot the preliminary injunction, despite what Mr. Lowell just said. BSJI operated for over a year without the master account. And you all say in your letter that it is just not right that denying the master account would mean that the bank would have to close.

So, the TRO is not, at least as I read the papers, the

be all and end all. There is a motion for a preliminary injunction that has to be briefed and decided. Go ahead.

MR. BRENNAN: Judge --

THE COURT: And my -- and part of my initial statement was the question whether the parties could not resolve the issue of the TRO while the preliminary injunction was briefed.

MR. BRENNAN: Thank you, your Honor. This is Michael Brennan for the New York Fed. So thank you for that explanation.

In terms of reaching an arrangement, I think there is extreme hesitancy on the New York Fed's side, and an emphatic support of a rejecting the TRO here, because, as your Honor mentioned, there has been reference to abuse of the account, and our compliance function, our Financial Intelligence Unit have done a thorough review over a six-month period of activity going through this account. And they identified high-risk activity. We asked BSJI for responses about it to try to get some comfort, and the responses did not provide that comfort, and, if anything, caused only more concern.

And BSJI keeps saying you are not giving me enough details. I can give one example. So, what we see are entities controlled by relatives of the owner of BSJI transferring funds to each other, and BSJI tells us that those are financial instruments. So we said, can you please send me the documentation supporting those. And then we looked at that.

And they don't resemble financial instruments at all. For example, there is bonds that lack an event of default. The interest rate doesn't make sense. So, it looks like these very well may not be financial instruments, and that causes significant concern in our compliance group, in our Financial Intelligence Unit, that there could be illicit financial activity going on. And that is a big driver in the reluctance to provide an extension.

And on top of that, three years ago, when the FBI raided BSJI's office, we did an immediate suspension of the services, because at that point the risk was so high to us, we couldn't have that exposure. And over the course of the year, there were discussions with BSJI back and forth about the terms under which they could get access to their account back, and part of that was them signing an agreement that expressly says in literal terms the New York Fed has the right to close this account and terminate our access to services.

So, we expect that this contract, it means what it says. We have a contractual right to take this action. It was something that the BSJI did to regain access to its accounts. That is where a big part of the reluctance to engage in any sort of arrangement with BSJI's coming from. And coupling that with just what we view as the complete lack of irreparable harm.

I understand your Honor noted that there is also a

request for a preliminary injunction in place. But, in order to even get there, there needs to be a TRO, and the standard for a TRO is generally same as for the preliminary injunction. If so, if they can't show irreparable harm at this stage, then that's it.

THE COURT: Stop, stop. That's just not right. It is just not right. There is an initial question about whether to grant the TRO. The TRO is temporary relief that is available for a maximum of 14 days, and can be extended for another 14 days. The plaintiff has the right to seek a preliminary injunction.

You say if you decide that there is no irreparable injury for purposes of the TRO, they don't get the preliminary injunction, so we don't, you know, we don't have to worry about briefing a preliminary injunction. That's not right. It happens that a TRO gets denied, and you move on to the issue of a preliminary injunction. Irreparable injury for purposes of the TRO is, is there going to be irreparable injury over the next 14 days, for a maximum of 28 days. Preliminary injunction asks is there irreparable injury before there is a decision on the merits. Should the status quo be maintained until there is a decision on the merits. The preliminary injunction lasts until there is a final decision on the merits.

You know, you can't simply say, gee, we won a temporary restraining order, therefore, we can forget the

preliminary injunction. It's not just right.

So, you argue that there is no irreparable injury in connection with the temporary restraining order because the bank will not go out of business if it loses its master account. But, that's a question of will it go out of business in the next 14 days? 28 days? That's a temporary restraining order. And we'll see. If the temporary restraining order is denied, the papers indicate that there are, as I said before, the bank has lost its master account for over a year, it lost a lot of clients as a result of that, but it kept the clients that it presently has. And it plainly is a relatively small bank, held by a single person, with relatively few accounts. Under those circumstances, will the bank go out of business over the next 14 days? It didn't go out of business for over a year. That's the TRO.

You don't get out of the requirements for briefing and my deciding a preliminary injunction, unless, which is highly unlikely, the plaintiff simply goes away. So I don't sort of understand your argument.

MR. LOWELL: Judge, before he responds, it is such an important point. This is Abbe Lowell. To address your point that you've said twice about what happened the last time without a master account. When it is appropriate, I'd like to answer that for you.

THE COURT: Okay.

MR. LOWELL: Since I've interrupted, maybe I should do it now.

THE COURT: No.

MR. LOWELL: I think the Court is not quite then given all the facts as to what happened to get us to here and what would happen to the remaining people, even in 14 or 28 days. But I'll wait when you tell me I can answer what you said and what he said.

THE COURT: Thank you.

So, Mr. Brennan, do you follow what I said?

MR. BRENNAN: Yes, your Honor.

THE COURT: There is going to have to be briefing on the preliminary injunction and a decision on the preliminary injunction, unless the parties reach some agreement on the ultimate relief that's being sought. There is a temporary restraining order, there is a request for a TRO, there is a request for a preliminary injunction, and then presumably, there's an ultimate trial, unless the parties agree to merge the preliminary injunction with the trial on the merits. That's the way it works.

So, you can't send me a three-page letter and say, ha, we think we'll prevail on the TRO and that will end this case. It doesn't work that way.

So, the question on the temporary restraining order, which I will have to decide unless the parties reach some

agreement, which they often do, is whether there is any agreement that can be reached to resolve the TRO. If not, then I would have to decide the TRO.

By the way, to underline something that I said at the outset, the papers submitted by the plaintiff BSJI were deficient in that you could read all of those papers -- unless you read the exhibits also -- and not have an understanding of the problems that the Federal Reserve Bank of New York found with respect to BSJI. You wouldn't know that the Federal Reserve Bank was concerned over the failure to submit any SARs. You wouldn't know that the concerns were about illicit activities and money laundering and the like. You would think that it's simply a question of failure to submit reports on time.

Now, Mr. Brennan, you begin to lay out for me some of the things that can be gleaned from some of the exhibits, but of course, those weren't in your letter either. And it may well be that I ask you to put in an affidavit in response to the TRO. I mean, I have to decide the TRO. It is only good for 14 days, extended for another 14 days. But, a three-page letter is usually not the way in which a TRO gets resolved.

MR. BRENNAN: Yes, your Honor. Michael Brennan for the New York Fed. And we just sent that letter today to give you some context. We are happy to provide a more fulsome submission, and we can do that.

THE COURT: Okay. So I return then to the questions that I posed initially, which were, usually in a case like this, the parties work out some sort of agreement, at the very least to let the parties intelligently brief and the Court to decide the temporary restraining order. I mean, this case cries out for something like that.

The parties have been talking to each other over a long period of time. I appreciate what I didn't get from the plaintiff's brief, and which I've tried to indicate that I have an understanding of, with respect to the defendant's concern about the use of the bank. It's why I suggested a monitor, someone else who sits there who look at the accounts to assure that the accounts are not being used for an illicit purpose, but that's only one suggestion.

The papers suggest that, at least the papers by the Federal Reserve Bank of New York, that it's possible to get a correspondent bank. Plaintiff says no, can't do that. I don't know the answer to that question.

So the question is the parties have been talking for a long time, so one wonders why they can't talk for somewhat more, whether to allow me to decide the TRO, or to decide the preliminary injunction.

Go ahead, Mr. Brennan.

MR. BRENNAN: Yes, your Honor. I just want to say that I hear you, and we will consult internally. You make some

good recommendations, and we will consult with the business areas and we will try to see if we can get to an arrangement with BSJI as suggested.

THE COURT: All right. Today is July 26. The date to close the account is I think July 31. So, you've got to give me your response, whether it's your response to the TRO or some agreement, some standstill, some conditions, some discussion with the plaintiff about how to proceed from here with respect to whether it is the TRO, or the preliminary injunction. You've got to give me that by Friday morning at 10, and then I'll decide where to go from there. Okay?

MR. BRENNAN: Thank you, your Honor. Understood.

MR. LOWELL: Judge, this is Abbe Lowell.

THE COURT: I was going -- I was coming back to you. Please.

MR. LOWELL: Okay. I knew you didn't forget.

THE COURT: No, no. I didn't. Okay.

So, Mr. Lowell.

MR. LOWELL: Going with the last point backwards to save time. If in fact they will go back to their business group, and talk, we will talk with them. And as you have made clear, we have hopefully dovetailed with you making it clear, it seems impossible that whatever their, quote, real concern, end quote, is, while we do an orderly recitation of our positions for the Court to decide, for example, the preliminary

injunction, given the history of our backs and forths, as you pointed out, should occur.

It is just unfathomable to me there is not something we couldn't agree with that is reasonable that allows this, as you say, to use your phrase, this is a case that cries out for such a way to proceed, and we have been willing for months. I want to just point out a couple of things while we're waiting for their response.

THE COURT: Can I stop you for a moment.

MR. LOWELL: Sure.

THE COURT: It is a matter of concern to me that your papers downplayed or ignored the concerns that the Federal Reserve Bank has with respect to the operations of the bank, including the lack of SARs, and the concerns by the compliance people that the bank was being used for illicit activities. And that while compliance audits were done, they weren't -- putting aside whether they were timely or not, I appreciate the dispute -- they didn't resolve ongoing problems, so that the compliance people at the bank were concerned and the bank was sufficiently concerned about the existence of illicit activities that it made the decision to terminate the account.

One, you know, one didn't get that from your papers. And that was plainly, in going over the papers, a concern that I had.

So, in talking about going forward, if there is to be

some modus vivendi until there is a decision by the Court, the question is, how can there be assurance that the bank is not used for illicit purposes? And I mean, the one remedy that came to my mind was the suggestion of a federal monitor, only because federal monitors seem to be used more often these days. This is a, you know, it is a small bank with small accounts. 100 percent held.

How many accounts does the bank have?

MR. LOWELL: 13, Judge. 14 accounts, 13 customers.

THE COURT: Okay. Should be possible to monitor that. So, go ahead. I interrupted you.

MR. LOWELL: Thank you. Your interruption was well taken, because what is in your head, when you are pondering where we end up with this TRO, is exactly what I need to respond to.

I will do all the points you made, but I'll do it in the order now in reverse, because that's the one you came to.

First want to address this illicit transaction, illicit concern. I do want to point out to the Court, just please remember, that that is the latest iteration of their concern which started with you failed to file your report on time, to what your great outside consultants indicate might be ways that you can even further improve what's already been proved. And highlighted 13 things, which is not the ones they are saying have been done and they are not, because you can

always make improvements, remember that all of those consultants had also stated that the compliance conditions and the ability to be a safe and sound institution under any objective standard were well met by BSJI at the time which the New York Fed unsuspended our account, December of 2020, forward to the time that our experts have been involved, our consultants have been involved.

So I just want to start by saying, when they said now what we mean is there are illicit transactions, and then they say something about, quote, shell companies, end quote. You do have to track that back to see where that began in terms of that's the reason why we need to put them out of business. So let's start there, but let me address that issue.

First let me address the issue that, contrary to what they say in the pejorative of the use of shell companies, your Honor is much more sophisticated to know that is something that people say that puts people on their heels. But shell companies by themselves are in no way improper. But more importantly for us, as the attachments and the experts I'll come back to what you said about where you have to read to know what we are saying. I have opined there are no shell companies. They're not shell companies. Putting aside that that wouldn't be the end-all-be-all if they were.

In terms of the illicit transactions, the one example they've provided we addressed, and I think they are talking

about an issue of a bond where they say that what is listed as such and then redeemed as such didn't match in some fashion. There is the declaration of Mr. Aponte in part of what we have done which explains, this as we explained it to them when it was first raised. And when we did explain to them, that the timing and amount of the transactions resulted from contractual obligations to the bondholders, they did not come back to us and say, oh, now we don't get it or now we do get it, which is the pattern that's occurred.

So I don't want to leave the conversation today with having the Court have the impression that by uttering the phrase "illicit transactions," there might be any meat to that hollow phrase.

Secondly, you have mentioned twice now the issue of SARs, and I would be remiss if I didn't make sure that before we leave this call, I think if the defendants know our position, the Court doesn't. Remember, Judge, once we lost the amount of customers and accounts we did, the amount of business and customer went such extraordinarily down that in a normal institution that routinely has to worry about filing SARs that occurs after the fact, the folks at BSJI are on the ground and they know the transactions in real time. And therefore, if there was a need, the transaction might not have occurred to begin with.

The idea that you don't file a SARs is in and of

themselves a reflection of some unsafe or unsound practice is only possible if there is a whole lot of SARs and you didn't do it.

Here, they have never to this moment pointed out a transaction that they have now seen that a SARs should have been filed for, let alone the SARs just being the beginning of the process.

That's why I'm saying that there are a lot of more intricacies that they've thrown at the wall at us for you to get a misimpression about words like "illicit" or "shell company."

They're telling us in this latest round, and you picking up on that phrase, they are the only entity of entities that have come to that accusation. Remember, BSJI has a supervisor in Puerto Rico, the OCIF. [redacted] We have had the scrutiny of seeking a new financial product and a credit card by a company that works with Visa.

This is not just us saying so. These are very important obligations that the entities that actually have been on the ground. The Fed has not been there, so I don't know what they're basing their conclusions on.

But all of my saying this is only to the point of saying it is a lot more substantive and complicated than simply

them saying, oh, now we are talking about illicit transactions and for you to pick up on that phrase.

On that point, if we were deficient, as you said our pleadings were, because you can't tell that we are addressing each successive point they've made without looking at the attachments. And I think the attachments do that, but I can't quarrel with you that if there was a way to take the essence of Mr. Aponte saying that the bond transaction is explainable in the following way, or Hector Vazquez explaining why they know about transactions in real time for which a SAR, there is no doubt in the many pages we filed, that it's not possible to do better. We can always do that better.

But I think the Court's concern is correct to state, but the record that we provided the Court should allay any real concerns that either you or the Fed have for the reasons I've said, both by pointing out the change of circumstance, the change of reasons to, for example, the specific answer as to SAR, the specific answer as to the bond, the specific answer for them to now say, oh, it is illicit transactions, when we have three other -- two other supervisors and lots of others that scrutinize us.

As to the one thing that I said I would -- and I interrupted the flow when I did that because it is such an important issue in this first period of time, on the issue of irreparable harm, even in 14 days.

Look, Judge, I am not going to tell you that if the account is closed -- as opposed to suspended, by the way -- on Monday, that on Tuesday morning at 9 o'clock every one of our customers leaves. I don't know that and I wouldn't say that. But I can tell you if past is prologue, we know what's going to happen. We lost hundreds of accounts after the last episode with the Fed, and it's only been -- of course COVID got in the way as well -- the ability to set the ship right in which now we are at a posture to be able to extend and grow and do so with the blessing up until the last month of the Fed. In compliance with the experts that have now day to day, including the former chair of the FDIC who you have the affidavit or the declaration for, to be able to be that.

But even if these people have stuck with us through this part, they need services, they need their checks to be cleared, they need the ability to have bank-to-bank transfers. If that's gone, no matter whether they know the owner of this bank or not, they are not going to suspend, and if past is prologue, I can't tell you, Judge, and I'm telling you the opposite, there is much more of a risk that this next hit would be the death knell. Now they say you are never going to end up getting it straight with these folks so we are going to go elsewhere. So it is irreparable harm or at least the threat of it is so severe given the past.

Look at what we were in 2020 and look at what the bank

is in 2023. We can't take this hit. In this situation, we don't get three strikes, your Honor, we get two. And the second one would be an out if it happened to us. So, I needed to address the irreparable harm issue as well.

And so finally, in terms of where that leaves us, in terms of what you said, I think what you earlier said, this case cries out for some interim possibility. I don't have an objection -- I say I -- the bank doesn't have an objection, and I'm sure we could figure out if what the Fed comes back and says to us after talking to their compliance people, notwithstanding everything that we provided them, that some form of additional monitoring of the activity of the bank on a day-to-day basis is what they need to hear from us to be able to have the orderly process schedule that you said, I'm sure we'd do it. We just have to figure out terms of that. I don't want that to be the only possibility, because I suspect if they talk to them in good faith and we them, whatever allowed them to go forward in January to April when we gave them information and they came back and said what about this one and this one of the 13, quote, deficiencies, to then following in June where we talked about the new issue. Whatever allowed this to continue, where their concern about that one transaction was not yesterday, it was not two weeks ago, it was in that same period. Whatever allows that to happen would allow this to happen for the next 28 days. It just would. Without there

being a risk to the system or any particular concern that could not be addressed.

So, I think I've answered your question about why would there be irreparable harm this time, if it had been suspended. Remember when you have a suspension, maybe at that point, given the good will of our customers and clients, suspension means, okay, they are going to work it out. Maybe it got worked out longer than it hoped. When it's closed after suspension, nobody would understand the nuance, and I don't blame them.

I think I've answered your question about their concerns about abuse of accounts and high-risk activity, by what I have addressed. I want to make sure I've done all you asked. And I think the issue of them making the statement in light of the other agencies that are in fact the supervisors, is something the Court should take into consideration.

And then in terms of even things like if there is an issue, do they take issue with what we are saying about we can't readily find a correspondent bank, is certainly something in our papers that address that too.

So I think I have addressed what we said. And not to -- the last point I think maybe everybody understands what it is to suspend. When you suspend, we actually then trap our clients' funds, and they didn't do anything that suggests that they should do this. That goes back to which of these accounts

do you think is the problem. If it is a single account, let's deal with it. You can't just say, oh, you have illicit questions.

What I conclude is I think under any fair reading of what TRO means, we are prepared to ask you to rule and grant us that. And we are only doing that because the defendants refuse to find an interim arrangement that would make that unnecessary.

So, I come back to where I started or where you started however long ago we started.

THE COURT: Okay. Mr. Brennan, anything you'd like to add?

MR. BRENNAN: Thank you, your Honor. I guess I would note that we disagree on almost every point that was just made. Irreparable harm -- yes.

THE COURT: Go ahead.

MR. BRENNAN: On irreparable harm, there is an asserted loss of customers. They have, as they noted, 13 customers at this point largely related to the owner. I don't think there is going to be a loss of good will between the owner and his relatives.

In terms of establishing irreparable harm, you generally have to show, and they have to show they're profitable, which they can't do.

In terms of the third-party consultants and the

supervisors, it certainly is not clear to us that any of those consultants or the parties that are signing off on anything that they are doing, have taken a look at their actual transactions. They look at their compliance programs. We don't think they're doing a good enough job at that. But the concerns we have about the transactional activity, the experts are not weighing in on.

In terms of the lack of SARs, I think part of what the issue is here is there are independence concerns. So if you have a bank that's controlled by a son, and there is a potentially suspicious transaction between his parents, is he going to alert FinCEN? There's a lack of SARs, and there are independence concerns related to the customers and the owner.

THE COURT: Let me stop you on that. If there is a concern about the fact that the bank has never filed a SARs, there should be a way to identify the transactions for which a SARs should have been filed, and was not. It shouldn't be sufficient to simply say the bank has never filed a SARs. And so the bank now has 13 customers. Presumably the compliance people can look at the accounts for the 13 customers and say here's a transaction on which a SARs should have been filed.

But as I listen to the other side, they say, they've never pointed out the transactions to us as to which there should have been a SARs.

MR. BRENNAN: Yes, your Honor. I appreciate that, the

question. So we are -- we do not supervise them, and we don't have the obligation to file a SAR or tell them to file a SAR. And I think the combination of the lack thereof and we did send them a request for information. It concerned a number of specific transactions. And so we directed them to some of the issues that we're concerned about. There's a fairly detailed requests of a number of questions that we have for them about very specific transactions.

So, there have been transactions flagged and we've gotten specific.

THE COURT: Are any of those transactions, have you all concluded that there should have been a SARs filed?

MR. BRENNAN: I don't think compliance views their role as having to do that -- or not just having to do it, but opining or instructing a bank that they should have given or filed a SAR in this circumstance.

THE COURT: So let me ask then a related question. I appreciate that the Federal Reserve Bank of New York is not the regulator so to speak for BSJI. But if the transactions at BSJI are such that that is what is of concern to the Federal Reserve Bank of New York, I come back to my suggestion of having a monitor, if you will, which would increase the compliance in order to give satisfaction or a modicum of satisfaction to the Federal Reserve Bank of New York.

As I hear the other side, they would be prepared to

have a monitor. Usually monitors are paid for by the monitoree. So, if the bank is concerned over transactions, have someone, even though the Federal Reserve Bank of New York is not the supervisor, have the BSJI pay for a monitor to provide satisfaction to the Federal Reserve Bank of New York.

I just -- hold on. I just suggest that because I understand your position with respect to the different role that the Federal Reserve Bank of New York have.

You all on both sides are far more expert about this than I am. I'm simply making these suggestions as a way that you all might -- might -- be able to resolve some of the interim issues.

MR. BRENNAN: Yes, your Honor. I appreciate that. And I will be talking to my compliance area, Financial Intelligence Unit. And I guess I want to be clear that we very well may be able to agree to some sort of interim risk mitigation measure. In terms of the long-term, the conclusion, based on the review, is that the risk cannot be mitigated long term.

So, but I hear you on interim measure that we can certainly discuss internally and meet and confer with BSJI on that point.

THE COURT: Okay.

MR. LOWELL: This is Abbe Lowell. We'll be glad to do it and do it soon with them, as soon as they can.

But, I do need, because we will leave you with whatever impressions we can provide you with this one hearing. Just as Mr. Brennan said when he first responded, I can't -- I don't agree with anything that was just said, I have to point out that what he said you shouldn't accept as exact information either.

Let me give you just a few examples and then maybe what we can do is agree with Mr. Brennan and his colleague when we will talk and figure out the schedule that we set.

But for example, it is not right to say that there have been no SARs. That is just not right. On the advice of these independent auditors, like K2 or FTI, these are the equivalent of independent auditors, SARs were done. They may not have been in the last year, which doesn't mean they should have been done in the last year, which goes back to the last point.

I didn't want the Court to leave the call thinking there's never been a SARs filed. Of course we can't provide the details of what SARs were filed and when, because the law prohibits that. But I can say what I just said comfortably.

Mr. Brennan says that they have no basis to believe, for example, that these independent auditors are doing anything other than looking at compliance programs. He knows or the material we provided would certainly indicate to him that's not true either. That, for example, AML RightSource has looked at

the majority of the accounts transactions as a sample, not just a few, to make their conclusion which you have, that is a safe, sound, not acting in bad ways, in, quote, illicit transactions.

So, third, when they say that they have no basis to believe that the supervisor in this case, OCIF, has actually looked at transactions, there's no basis to say that either. It is not they are saying you have a program. They have actually looked at the transactions.

And so, I just needed to make sure I corrected that or at least put our 2 cents on the record for that, which may have to get fleshed out when I hear him say we have concluded that in the long term there are no conditions that would mitigate the risk. That seems, again, sort of hard to understand given the size. And again, cleaning up the notion we know the people that are our customers isn't something that indicates that we turn away to wrongdoing. That's a presumption that's not merited by either who the owner of this bank is or his accomplishments or his pedigree or how he has run this institution or what has happened after 2019.

We do want to point out that after the Fed sort of shot first and aimed second after there was a media account of the FBI activity at the bank over financial transactions in specific, and not all, over that long period of time, we convinced and showed that there was no merit to that. And not only no merit, remember, the authorities involved gave the bank

a non-prosecution statement for no wrongdoing, and returned all the money that had been taken.

So, the idea that there's a relationship of customer and owner means there is something bad, it doesn't do that. It quite might do the opposite by recognizing why there might be only one or two SARs in a given period of time.

All that said, when I have the chance to at least let the Court know what we think about the things that Mr. Brennan said about those subjects, still leads us to what the Court asked for, which, as I understand it, is we will talk to Mr. Brennan and others, hopefully satisfy them in the near term that there is something that can be done. Obviously, one says the word "monitor," maybe that's the best solution, but what does that mean? You already talked about the cost. I don't know what, given the size of the bank, its number of customers, we will allow conversation about all of that. So we just need -- if that's the best solution, we are amenable. If there is another solution, because we've had folks like the independent auditors that look at transactions and are there, we can figure that out.

I guess what I'd say is I think you've indicated you'd like them to get back to you by Friday morning. I guess that would be, if we can work something out, you'll hear from both of us. If we cannot and you still want their response on the papers we filed, then given that Monday is the day of closure,

and we would get their response on the merits, I would like to figure out if we could get the Court a reply to what they say before the magic moment at the close of business on Monday.

THE COURT: If there is a necessity for a reply, you could give me the reply by 5 o'clock on Friday.

MR. BRENNAN: Okay. We'll work to do it. I hope we don't need it, but I had to ask for a placeholder.

THE COURT: Okay. All right. Thank you, all.

MR. LOWELL: Thank you for your time, Judge.

THE COURT: Okay.

MR. BRENNAN: Thank you, your Honor.

THE COURT: All righty. Bye now.

(Adjourned)